The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY PENDING RESOLUTION OF MANDAMUS PETITION

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INTRODUCTION

Defendants' request to stay enforcement of the Court's July 27, 2018 discovery order is without merit and should be denied. In making that request, Defendants eschewed alternative avenues of relief, such as asking for an extension of the Court's ten day compliance deadline. Instead, they simply declared compliance was "impossible," petitioned for the extraordinary remedy of mandamus, and moved for a stay. The reason is plain: Defendants again hope to grind this case to a halt as they re-litigate meritless arguments on appeal. The Court should deny Defendants' stay request.

Defendants do not satisfy any of the requirements for a stay. They are not likely to succeed in obtaining mandamus, because they cannot show any error, let alone the clear error necessary to obtain such extraordinary relief. Nor will Defendants suffer any irreparable harm by complying with the Court's order while their petition is pending. Plaintiffs, by contrast, will be harmed as this case will remain stalled while mandamus is decided. Finally, the public interest clearly favors advancing this case in order to ensure the rule of law is upheld and the Court's core Article III duties are discharged.

While Defendants' motion should be denied, the Court can obviate any purported claim of irreparable prejudice by making the following modifications to its order, which Plaintiffs would not oppose. The deadline for compliance would be extended until October 10, 2018, when the Ninth Circuit will hear argument on Defendants' petition, provided Defendants use this additional time to actually comply with the Court's order by (a) preparing a legally sufficient log of documents withheld on the grounds of the presidential communications privilege and submitting that log to the Court *in camera* (but not providing it to Plaintiffs unless and until the petition is denied), and (b) preparing documents withheld on grounds of the deliberative process privilege for production and certifying to the Court they have done so (but without producing such documents to Plaintiffs unless and until the petition is denied).

These modifications will ensure Defendants comply with the Court's order, guarantee that discovery is not further delayed by allowing Defendants to avoid any effort to comply until after their petition is denied, and avoid the purported harm they claim from immediate compliance.

ARGUMENT

A stay pending appeal is extraordinary. It is "not a matter of right, even if irreparable injury might otherwise result." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (internal citation omitted). In deciding a stay request, this Court considers (1) whether the government "has made a *strong showing* that [it] is likely to succeed on the merits, (2) whether the [government] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (emphasis added). The government's burden is even higher here because it is seeking a writ of mandamus, "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Id.* Moreover, the government bears the heavy burden of showing that its "right to issuance of the writ is 'clear and indisputable.'" *Id.* at 840-41. The government cannot meet this exceptionally high burden for obtaining a stay here.

A. Defendants' Mandamus Petition Is Unlikely to Succeed.

The most important factor in considering a writ of mandamus is "whether the district court's order is clearly erroneous as a matter of law." *In re Van Dusen*, 654 F.3d at 841. The absence of this factor "will always defeat a petition for mandamus." *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016). Clear error review "is significantly deferential." *Id.* The standard "is not met unless the reviewing court is left with a definite and firm conviction that a mistake has been committed." *Id.* Thus, it is the government's burden to make a "strong showing," *Nken v. Holder*, 556 U.S. 418, 434 (2009), that it has a "clear and indisputable" right to the "drastic and extraordinary" remedy of mandamus, *In re Van Dusen*, 654 F.3d at 840. The government cannot do so here.

1. Defendants Cannot Show Any Error, Let Alone Clear Error, in the Court's Denial of Their Motion for a Protective Order.

When the rhetoric is stripped away, the only legal error Defendants claim with respect to the Court's order requiring the government to submit a privilege log of documents withheld on

grounds of the presidential communications privilege is that *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004), requires that, before the government even has to invoke the privilege and provide a log of the documents withheld, the Court must "narrow plaintiffs' broad discovery requests, consider the non-privileged discovery that is available, and ask whether plaintiffs have demonstrated a particularized need." Defs' Pet. for Mandamus, Dkt. 302-1, ("Pet.") at 25; *see also id.* at 21-27; Defs' Mot. to Stay, Dkt. 300, ("Mot.") at 5. But *Cheney* does not contain any such holding and did not purport to establish a general rule for all cases where the President is sued or subpoenaed for documents.

As Plaintiffs demonstrated both in their opposition and at oral argument, *Cheney* was a narrow, fact-bound decision that was limited to the unique circumstances presented in that case. *See* Dkt. 278 at 7-8. It involved a claim under an arcane federal statute requiring federal advisory committees to disclose certain information about their meetings. 542 U.S. at 373. At the motion to dismiss stage, the district court was unable to determine whether a statutory exemption that would result in dismissal of plaintiffs' claims against executive officials applied. To resolve this limited issue, the court permitted plaintiffs to conduct "tightly-reined" discovery to assess whether the statutory exemption applied. *Id.* at 375-76. But despite the limited nature of the inquiry, plaintiffs propounded "overly broad discovery requests," which essentially asked for the exact meeting records they hoped to gain in the event they succeeded on the merits, "and much more besides." *Id*. at 386, 388; *see also id.* at 393 (Stevens, J., concurring) ("In other words, respondents sought to obtain, through discovery, information about the [the advisory committee's] work in order to establish their entitlement *to the same information*." (emphasis in original)). The Supreme Court concluded that "*in these circumstances*" the government was not required to "bear the onus of critiquing the unacceptable discovery requests line by line" before its separation-of-powers concerns were addressed. *Id.* at 388 (emphasis added).

In so holding, the Court recognized that the controlling case on the presidential communications privilege was *Nixon*, where the Court required the President to "first assert privilege to resist disclosure." *Cheney*, 542 U.S. at 384; *see United States v. Nixon*, 418 U.S. 683, 713 (1974); *In re Sealed Case*, 121 F.3d 729, 744-45 (D.C. Cir. 1997). But it concluded that

Nixon did not apply in the circumstances of that case. This was because there—unlike in *Nixon* and here—the information withheld on a claim of presidential privilege did not relate to a constitutional right or other issue of "constitutional dimension"; did not interfere with a "court's ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction"; and did not undermine separation of powers by "interfer[ing] with the function of the courts under Art. III," and "hamper[ing] another branch's ability to perform its 'essential functions.'" *Cheney*, 542 U.S. at 384-86.

Moreover, here as in *Nixon*—and unlike *Cheney*—"there are various constraints . . . to filter out insubstantial legal claims" that might "disrupt the functioning of the Executive branch." *Cheney*, 542 U.S. at 386. Indeed, there can be no concern with requiring the Executive Branch to respond to frivolous claims here. Plaintiffs challenge a Ban that: was ordered directly by the President; on its face expressly discriminates against a minority group, implicating serious constitutional issues involving fundamental rights; and raises constitutional claims to which the discovery in question is not only relevant, but indispensable, to the searching, fact-based heightened scrutiny analysis this Court is constitutionally required to perform. Moreover, and unlike *Cheney*, this case is in a procedural posture where Plaintiffs' claims have not only been judicially reviewed and sustained on motions to dismiss and for summary judgment, but the Court has twice concluded that Plaintiffs are likely to succeed on the merits. Like *Nixon*, Plaintiffs claims have survived "various constraints" that "filter out insubstantial legal claims." 542 U.S. at 386.

In short, and as Plaintiffs explained at argument, almost every aspect of *Nixon* that made it "fundamentally differen[t]" from *Cheney* applies with equal force here. The Court was correct in holding that *Cheney* does not control here, and it followed well settled-precedent under *Nixon* and *In re Sealed Case* in placing the burden on the government to invoke the privilege in the first instance and to provide an adequate privilege log. Only then can the Court determine whether the privilege applies, and if so, whether Plaintiffs have met their burden of overcoming it. *In re Sealed Case*, 121 F.3d at 744-45.

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But even if *Cheney did* require the threshold showing Defendants claim, it would be satisfied here. First, there are no other sources from which Plaintiffs could obtain this indispensable evidence. By definition, it concerns the *President's* "communications and deliberations," and even if such information *were* available from other sources, Defendants claim the privilege would apply to those sources as well. Dkt. 268, at 1. Tellingly, Defendants do not even purport to specify what other sources Plaintiffs could pursue for this information, or what further showing of need they could make.

For similar reasons, Plaintiffs have shown a "heightened, particularized need" for this information. As Plaintiffs explained at oral argument, this evidence is the sort of "indispensable information" on which the Court's "ability to fulfill its constitutional responsibility . . . hinges." *Cheney*, 542 U.S. at 385. The Court cannot perform the "searching judicial inquiry" that strict scrutiny requires without evidence of the true motivations and actual justifications for the Ban at the time it was announced. Order Granting Mot. to Compel; Den. Mot. for Protective Order ("Order") at 7. The same is true of the Implementation Plan, which Defendants claim is a "new policy." As to both, Plaintiffs are entitled to know who was consulted and what information was considered and they cannot learn that without obtaining the withheld discovery.

Finally, the requests on their face call for information that is not just relevant, but central to the constitutional analysis. Defendants' general, unsupported assertions to the contrary do not even attempt to show that any specific request was overbroad. Moreover, at this point, all the Court has ordered is that Defendants finally provide a legally sufficient log. It has not yet ruled whether the privilege applies, or if it does, whether Plaintiffs have met their burden of overcoming it. Defendants will have ample opportunity to argue that specific documents or categories of documents are not relevant to the Court's constitutionally required analysis.

At bottom, the draconian yet amorphous, three-part threshold showing Defendants advocate would make the President effectively immune from discovery, in direct conflict with *Nixon*. 418 U.S. at 706 (rejecting an "absolute, unqualified Presidential privilege of immunity from judicial process"). That threshold showing, which Defendants have made up out of whole cloth and which is not found in *Cheney* or any other case, is one the government could always

claim is not met, and thereby avoid any judicial review of presidential claims of privilege. Defendants have not shown any error in the Court's rejection of this unsupported argument, let alone the clear error required for mandamus.[1]

2. The Court Did Not Commit Clear Legal Error in Granting Plaintiffs' Motion to Compel Documents Withheld Under the Deliberative Process Privilege.

Defendants also fail to show any clear legal error in the Court's order granting Plaintiffs' motion to compel the production of documents withheld solely on grounds of the deliberative process privilege. Defendants do not dispute that the Court properly applied the balancing test established in *FTC v. Warner Communc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), and do not seriously critique the Court's application of that test to the facts here, which is subject to highly deferential review. Pet. at 29; *see, e.g. Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995) (explaining "the deliberative process privilege is 'a discretionary one'" and therefore refusing "to tinker with the [district] court's determination that that the [plaintiff's] interest in due process and fairness outweighed [the government's] interest in shielding its deliberations from public view"). While Defendants characterize the Court's analysis of the fourth *Warner* factor—the extent to which disclosure would hinder frank and independent discussions—as a "radical discounting of the government's interest in confidentiality," Pet. at 31, they do not cite a single authority in support of that contention, and Defendants' own supporting authority says the opposite, rejecting application of the privilege even in the military and national security context. *See Viet. Veterans of Am. v. C.I.A.*, No. 09-CV-0037 CW JSC, 2011 WL 4635139, at *12 (N.D. Cal. Oct. 5, 2011) (finding "this factor

[1] On August 6, 2018, the court in *Doe v. Trump*, Civ. Action No. 17-1597 (D.D.C.), issued two decisions that may bear indirectly on the issues here. The first denied Defendants' motions to dismiss or in the alternative for summary judgment and to dissolve the the court's prior preliminary injunction. Among other things, it adopted (and quoted) this Court's reasoning in rejecting Defendants' argument that the case was moot and plaintiffs lacked standing and the injunction should be dissolved because the Mattis Implementation Plan is a "new" policy. *See* Dkt. 157 at 9 ("[T]he Mattis Implementation Plan is just that -- a plan that *implements* the President's directive that transgender people be excluded from the military."); *see also id*. at 17 n.6, 24, 25, 29. In a second decision, the court granted Defendants' motion to dismiss the President as a party "to avoid unnecessary constitutional confrontations," but "emphasiz[ed]" that such dismissal would not prevent the court from "review[ing] the legality of the President's actions" or awarding Plaintiffs "*all* of the relief they seek" if they prevail. Dkt. 155 at 2. Once again, the court expressly noted, and later reiterated, that "[t]o the extent that there exists relevant and appropriate discovery related to the President, Plaintiffs will still be able to obtain that discovery despite the President not being a party to the case." *Id.* at 6; *see also id.* at 8.

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alone is not dispositive" and holding plaintiffs' need for documents overcame government's interest in confidentiality). Defendants also criticize the Court's conclusion that all the withheld documents are relevant, challenging in particular the relevance of documents pertaining to the Carter Policy. Mot. at 6 (quoting Order at 7). But Plaintiffs already squarely rebutted this argument, explaining that "documents demonstrating that the same issues and concerns Defendants now cite to support the Ban were previously considered and rejected by military leaders are relevant to Plaintiffs' rebuttal that Defendants' purported justifications are simply post-hoc rationalizations sought to justify animus and discriminatory intent." Dkt. 273, at 4. And the fact that the Court concluded the withheld documents are relevant is no surprise. After all, Defendants identified them as responsive to Plaintiffs' requests and withheld them precisely because they pertain to deliberations about military service by transgender individuals.

Defendants' principal complaint is that the Court erred by applying its *Warner* analysis "en masse rather than assessing specific documents or categories of documents." Pet. at 30. Once again, however, Defendants cite no authority even suggesting the Court must apply the *Warner* factors on a document-by-document basis as to each of the 19,000 documents Defendants have withheld on deliberative process grounds. The lone case they cite, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980), held only that it is the government's burden to demonstrate the privilege applies on a document-by-document basis. It did not address the separate question of whether the privilege may be *overcome* by arguments that apply universally to all documents withheld—and in fact the same court the government cites, the D.C. Circuit, subsequently considered that very question and squarely held that it could. *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998); *accord Ariz. Dream Act Coal. v. Brewer*, No. CV-12-02546-PHX-DGC, 2014 WL 171923, at *3 (D. Ariz. Jan. 15, 2014) ("Even if Defendants had made this threshold showing [that every document were privileged], the Court would conclude, under the four factors articulated in *Warner*, that the qualified privilege should not be applied *in this case*." (emphasis added)); *Acad. of Our Lady of Peace v. City of San Diego*, No. 09CV0962 WGH (MDD), 2011 WL 6826636, at *8 (S.D. Cal. Dec. 28, 2011) ("Accordingly, even if privileged, the Court

ORDERS the withheld documents disclosed as the qualified deliberative process privilege is overcome *in this case*." (emphasis added)).

Defendants also simply ignore a separate body of settled law holding that the deliberative process privilege has no application where, as here, Plaintiffs' claims turn on the government's intent and deliberations. *See In re Subpoena Duces Tecum*, 145 F.3d at 1424 ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place . . . in a constitutional claim for discrimination. . . . We therefore see no need to engage in the balancing test applied in deliberative process privilege cases." (footnote omitted)).[2] These cases provide an independent basis for the Court's holding.

In sum, Defendants cannot show any error, much less the clear error required for mandamus. For this reason alone, their request for a stay should be denied.

B. Defendants Will Not Suffer Irreparable Harm.

A further, essential prerequisite for a stay is a showing that, absent a stay, the movant will be irreparably harmed. *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012); *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011). Defendants do not, and cannot, show such harm here. For that reason, too, their motion should be denied.

As to the presidential communications privilege, this Court ordered only that Defendants finally comply, by a date certain, with its prior April 19, 2018 order that they provide a legally sufficient log. Defendants do not even attempt to show how that order, or their compliance with their legal obligation under Rule 26(b)(5), somehow constitutes irreparable harm. To the extent Defendants assert they cannot prepare the legally required log without disclosing privileged information, Mot. at 2; Pet. at 26-27, Rule 26(b)(5) itself provides the answer: it expressly permits a party to produce a log "without revealing information itself privileged or protected." Fed. R. Civ. P. 26(b)(5). Moreover, Defendants do not cite any authority for the proposition that

[2] *Accord, e.g.*, *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540 (W.D. Wash. 2000); *Allen v. Woodford*, No. CV-F-05-1104 OWW LJO, 2007 WL 309945, at *9 (E.D. Cal. Jan. 30, 2007); *Children First Found., Inc. v. Martinez*, No. 1:04-CV-0927(NPM/RFT), 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007); *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006); *United States v. Lake Cnty. Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005); *Burka v. N.Y.C. Transit Auth.*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986).

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identifying the individuals advising the President is in and of itself privileged such that the government cannot be compelled to prepare a compliant log. On that theory, courts and requesting parties could never evaluate claims of presidential communications privilege.

As for the deliberative process privilege, where the Court did order disclosure, Defendants' suggestion that disclosing documents claimed to be privileged constitutes irreparable harm is undermined, if not eliminated entirely, by the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009). There, the Court rejected Mohawk's claim that "the right to maintain attorney-client confidences" would be "irreparably destroyed absent immediate appeal of adverse privilege rulings":

> In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence. . . . Mohawk is undoubtedly correct that an order to disclose privileged information intrudes on the confidentiality of attorney-client communications. But deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel.

Id. at 108-09. Tellingly, the cases Defendants cite to the contrary were all decided prior to *Mohawk*. *See* Mot. at 3.

Perhaps recognizing that disclosure does *not* constitute irreparable harm, Defendants appear to place their principal reliance on the purported "staggering burden" of complying with the Court's order within ten days. Mot. at 3-4. However, Defendants simply ignore that they created this burden by invoking the presidential communications privilege as to every single responsive document from the White House (apparently 9,000 documents in total) and by invoking the deliberative process privilege as to "every document remotely connected to the deliberative process here," Pet. at 30-31 (19,000 documents in total). They then compounded it by failing to comply for three-and-a-half months with the Court's April 19, 2018 order that they prepare a legally sufficient log of all documents withheld on grounds of the presidential communications privilege, and by evading Plaintiffs' repeated requests, starting in February

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2018, for adequate privilege logs as to thousands of documents withheld on other grounds. Defendants also ignore that if the ten day deadline for compliance were truly Defendants' concern, they could have addressed it by simply requesting more time.

In any event, the harm Defendants complain about will be avoided if the Court modifies its order to grant an extension of time and make the other modifications with respect to Defendants' compliance set forth in Section E below.

C. A Stay Will Harm Plaintiffs and Unnecessarily Delay This Proceeding.

A stay would harm Plaintiffs—and reward Defendants for filing a meritless petition for mandamus—by further and indefinitely delaying any effort by Defendants: (1) to prepare the log of documents withheld on grounds of executive privilege that this Court first ordered three-and-a-half months ago; (2) to remedy the deficiencies in their other privilege logs that Plaintiffs have been complaining about since February; and (3) to review and prepare for production the 19,000 documents they have withheld solely on grounds of deliberative process privilege. This would mean that if and when Defendants' petition is denied, discovery will be further delayed while Defendants then comply with the Court's July 27, 2018 order. This further and wholly unnecessary delay can be avoided by denying Defendants' motion for a stay, extending the deadline for compliance, and making the other modifications to the Order discussed in Part E below.

D. The Public Interest Lies With Ensuring Compliance With the Court's Order.

Finally, Defendants bear the burden of showing "where the public interest lies," *Nken v. Holder*, 556 U.S. 418 (2009), and here they do not carry it. Nor could they. The public interest favors enforcing compliance with the Court's order for at least two reasons. First, the government's attempt to stay enforcement unnecessarily delays the Court's ability to obtain information that is indispensable to the performance of its core Article III responsibilities to evaluate and vindicate Plaintiffs' constitutional rights. *Cheney*, 542 U.S. at 385 (noting that the "availability of certain indispensable information" may impair a "court's ability to fulfill its constitutional responsibilities to resolve cases and controversies within its jurisdiction"); *Nixon*,

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418 U.S. at 707. Without this discovery, the District Court cannot perform the "searching judicial inquiry that strict scrutiny requires." Order at 7.

Second, the public interest lies with upholding the nation's "historic commitment to the rule of law," and ensuring that even the President is not above the law. *Nixon*, 418 U.S. at 708 ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."). That includes complying with court orders, which is particularly relevant here, where a stay would allow the government to continue to disregard this Court's prior April 19, 2018 order that it prepare a legally sufficient privilege log. *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980) ("The public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders.") (alterations omitted); *see also Berne Corp. v. Virgin Islands*, No. 2000-141, 2008 WL 4371518, at *6 (D.C.V.I. 2008) ("[T]he public interest disfavors such deliberate contumacy by the very government that expects compliance with its laws.").

E. The Court Can Obviate Defendants' Claimed Prejudice While Ensuring They Comply With the Order Pending Resolution of Their Mandamus Petition.

While a stay is not warranted, Plaintiffs believe there is room for reasonable modifications to the Court's order to obviate the two harms Defendants claim while at the same time ensuring that they comply with the order while their mandamus petition is pending. First, Defendants claim that complying with the Court's ten day deadline is an "impossible," "herculean task." Mot. at 1, 3-4; Pet. at 3, 6. This claimed prejudice would be eliminated by extending the deadline for compliance with respect to the portions of the Court's order Defendants complain about to October 10, 2018, when the Ninth Circuit has scheduled argument on Defendants' petition, which Plaintiffs would not oppose. With more than 60 additional days to comply, Defendants cannot credibly argue the schedule is impossible.

Second, Defendants claim that they will suffer irreparable harm from complying because it "may" result in the disclosure of information they believe is privileged. The Court can mitigate

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any purported harm from disclosure by establishing procedures that allow for Defendants to demonstrate their compliance with the order while not requiring disclosure to Plaintiffs unless and until the Ninth Circuit denies their mandamus petition. *See Warshawer v. Tarnutzer*, No. C14-1042 RSM, 2016 WL 4496893, at *4 (W.D. Wash. Feb. 1, 2016) (denying motion to stay where court could adopt procedures to avoid disclosure of privileged documents "in a way that protects them until the Petition for Writ of Mandamus is decided"). Thus, Defendants' contention that the President's privilege log "may" disclose privileged information can be addressed by requiring that Defendants submit the required log to the Court *in camera* by October 10th, and then only disclose the log to Plaintiffs upon denial of Defendants' mandamus petition. As to the Court's order that Defendants produce documents withheld under the deliberative process privilege, the Court could require Defendants to perform the re-review they claim is necessary, and certify to the Court and Plaintiffs that all documents are ready for production, by October 10th. However, the documents would not be produced to Plaintiffs unless and until mandamus is denied.

Defendants do not specifically address the Court's order that Defendants revise their *other* privilege logs to "provide sufficient information to assess the claimed privilege" and satisfy Rule 26(b)(5)(a)(i)-(ii). Order at 11. As to that part of the Court's order, Plaintiffs would not oppose a shorter extension of 14 additional days, or until August 20, 2018, for Defendants to comply.

These modifications would ensure that Defendants comply with the Court's order while their petition is pending, guarantee that discovery is not further delayed by allowing Defendants to avoid compliance until after their petition is denied, and avoid the purported harm Defendants claim from immediate compliance.

CONCLUSION

Defendants' motion to stay enforcement of the July 28, 2018 discovery order is legally insufficient and should be denied. However, the purported harms Defendants assert can be obviated by modifying the Court's order as discussed above, which Plaintiffs would not oppose.

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Respectfully submitted August 8, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on August 8, 2018.

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